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No. Civil Action 91-3089 SSH

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IN THE

SUPREME COURT OF THE UNITED STATES

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DOUGLAS RAYBURN – PETITIONER

VS.

SECURITIES AND EXCHANGE COMMISSION, – RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

DOUGLAS RAYBURN

329 LAWRENCE REID RD.

JAYESS, MS 39641

601-684-1901

48 Pg

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1.) My rights to civil procedure have been grossly manipulated and disregarded and I'm asking this court to rule on this misconduct?

2.) Will this court look at my record separate from the other defendants and judge my actions as a prudent person in my attempt to register if, I had been instructed properly by the Securities Division in the State of Mississippi?

3.) Will this court look at every testimony against me, every deposition where I have factually spoken to the public in any form as alleged and determine, if I indeed committed fraud or made omissions.

4.) Will this court give me a right to a jury trial in a fair venue to determine sinter or a mistrial in this case?

5.) Will this court vindicate my Constitutional Rights to Contractual Recovery not only as a Businessman, but as a creditor, also as Chairman of Creditor's Committee, all of which is part of the whole record, that was negated by the Federal Securities Exchange Commission and the Circuit Court?

6 ) Will this court give me credit for monies frozen in my account by the District Court, and vindicate me for the destruction of my business without due process?

7.) Will this court look at the whole record as it pertains to the Defendant Rayburn and to his involvement personally as to the material facts, the district judge displayed a biasness in formulating his opinion showing prejudices towards the defendant Rayburn, on unproven allegations.

8.) Will this court look at the defendants undisputed facts, it will find that the appellate court failed to evaluate the "erroneous facts" made and alleged by the plaintiff.

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## JURISDICTION

[ ] For case from federal courts:

The date on which the United States Court Appeal decided my case was Oct 15, 2001.
A copy of that decision appears at **Appendix C.**

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: Jan. 10, 2002, and a copy of the Order denying rehearing appears at appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. _____A _____.

[ ] For case from state courts:

The date on which the highest state court decided my case was May 18, 2000.
A copy of that decision appears at **Appendix D.**

[ ] A timely petition for rehearing was thereafter denied on the following date _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. _____A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a)

## STATEMENT OF THE CASE

In 1990 I paid $20,000, to be trained in medical insurance claims factoring, by a company that had been in business for approximately two years in the state of Louisiana. While working part time with them and putting my business together in the state of Mississippi, I hired a U.S. Attorney to contact the State Securities Division in Mississippi, to see if I needed to register. I needed to make sure I wouldn't be dealing in securities. **Securities Regulation-Federal §1548 Due diligence defense; statutory provisions section 11 of the Securities Act, in addition to establishing several other affirmative defenses, if that person can sustain the burden of proving, as to any part of the registration statement**. The Senior Staff Attorney understood I wanted to raise money for my business from commercial loans and he even told me what to do to be exempt. After paying for an official Opinion that stated that my contracts did not constitute securities and was considered a legal debenture, I continued to operate in good faith. However, the following year I was joined with 17 other defendants and charged with Securities Violations and Security Fraud. By incorporating me with all the others, I somehow became guilty of all their sins and lost my individual freedoms and my Constitutional rights to Due Process, Fair Venue, and Jury Trial. **(Appendix F)** Then later the Opinion writer came back on the side of the **SEC** and acted like he was caught by surprise and was mislead. **Article 14§1 I/S/Constitution. Nor shall any State deprive any person of life, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

**Erskine b. Upham. 56 Cal. App. 2d 235, 132 P,2d 219, 228; Trepanier v. Standard Min. & Mill, Co., 58 Wyo. 29, 123P.2d378,380 such may be ground for new trial and reversal of judgment. Fed. R. Civil P. 59**

I was ordered by the court to collect on all my accounts receivables, but then the Federal Security Exchange Commission (**SEC**) denied me access to legal contracts that would have recovered all my clients money, for they controlled the debtor and trustee of the bankruptcy proceedings (They were a Cats Paw #4.) **(Appendix G)**. The **SEC** denied me access to money to continue to collect accounts on my books, totally shutting me down, by allowing no

money for operating expenses. I was denied the right to operate my private medical collection business, and my medical software and computer business. I was forced to close my business down and fire my employees. I was forced to face duplication of all records numerous times and shipment with absolutely no compensation and no recompense. My account was frozen and later taken, with no accounting of it by the district court that froze it. State and Federal tax liens were placed upon me for unpaid taxes. I borrowed money at 37% rate to hire an attorney to help me at the Exchange's (**SEC**) deposition, but when the day came for the deposition the attorney didn't show up. I requested a copy of the deposition, but never received it. Rules of Civil Procedure

**RULE 30. Depositions upon oral examination (e) Submission to Witness; Changes; Signing. When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection (b) 4 of this rule, and if the transcription or recording thereof is to be used at any proceeding in the action, such transcription or recording shall be submitted to the witness for examination, unless such examination is waived by the witness and by the parties. [I never waived my rights to a jury trial nor to this rule.]**

**Johnson v. Rodriguez, 110 F.3d 299 (5th Cir. 1997), reh'g and suggestion for reh'g en banc denied, 117 F.3d 1419 (5th Cir. 1997) and cert. Denied, 118 S. Ct. 559 (U.S. 1997).**

On 5/4/92 I tried to get the venue changed to Mississippi where I could at least face my accusers and talk plain language (common English). I knew I was set up and already found guilty and nothing I said ever meant a thing to these people. I was denied the right to present my witnesses; (**Plain error**) I was denied the right to cross-examine. I produced documentation to support my position of material facts, only for it to not to have been addressed and was callously disregarded, because of the undisputed biasness of the presiding magistrate. (**Plain error**) The Commission had judged me guilty of a conspiracy to commit security fraud with People I didn't even know. (**Plain error**) I was alleged to be an insider, yet I lost everything and that doesn't happen to insiders. (**Plain error**) The **SEC** used a deposition they never let the defendant sign off on.

**(Plain error rule–encompasses those errors, which are obvious, which affect the substantial rights of the accused, and which, if uncorrected, would be an affront to the integrity and reputation of judicial proceedings. U.S. v. McCord, 166 U.S. App. D.C. 1,501 F.2d3341.)** The Commission having a venue across the street from the courthouse smirked at me for not wanting to drive 1500 miles to come to court. Then claimed there never was a trial to come to. **Article 3. §3U.S. Constitution The trial of all Crimes. Except in cases of impeachment, shall be by Jury**. They alleged I was involved in a fraudulent scheme to sell unregistered securities, yet this was never a proven fact, were it applies to Douglas Rayburn as one defendant. **Securities Regulation-Federal §1700 No person should be enjoined without a finding that he personally committed a securities violation.** To the contrary you will find that I acted in a prudent manner throughout this case even to this very day. While this case was in Federal Bankruptcy, I was elected to be the chairman of the creditors committee and even in this capacity I was denied access to medical accounts that could have been collected for all the creditors. The trustee verified to the **SEC** he needed help with these accounts and that these accounts had a significant value to them and that people on the creditors committee had the expertise to collect them, but the **SEC** denied for this to take place. (**Appendix G**) Causa sine qua non **Hayes v. Railroad Co., 111 U.S. 228, 4 S. Ct. 369, 28 L.Ed. 410**

The controversy with the prosecution is with the term <u>selling notes and or debt securities</u>. First of all, I never sold anything to anyone at any time. To constitute a sale there must be parties standing to each other in relation of buyer and seller, their minds must assent to the same proposition, and a consideration must pass.

**Wade-Corry Co. v. Moseley, 223 Ga. 474,156 S.E.2d64, 65. Passing of title from seller to buyer for a price. U.C.C. §2-106(1).** I made loans with people and paid them interest on those loans. At no time was I ever late and at no time did I ever not pay off a loan when a lender made a call, except when the **SEC** shut me down. Even after the freeze order and the company was put in bankruptcy, I could have collected on my collateralized loans with Current of Louisiana for the money was still there, for the trustee

did not know how to collect on those home infusion nurse care claims. I have professional witness to verify this fact even the debtors on testimonies. (**Appendix H & G**) The **SEC** also biased the magistrate by inflaming him that Rayburn prayed upon widows in his church and got them to take their money out of certificates of deposit to invest. This statement was never verified to be a matter of truth or fiction. Not one testimony from one widow, not one deposition. **(Plain Error) Fed. R. Civil P. 43 (b) Cross-examination the examination of a witness upon a trial or hearing, or upon taking a deposition, by the party opposed to the one who produced him, upon his evidence given in chief, to test its truth, to further develop it, or for other purposes.** The defendant Rayburn was never given this basic civil procedure to contest and/or produce witnesses before the court. Rayburn produced testimonies from his clients yet the judge never referenced them, never acknowledged them, so it is evident they were disallowed. He only acknowledged what the **SEC** alleged. This statement wasn't even made during a deposition but at an impromptu talk. Every misrepresentation the **SEC** pleaded never came from one defendant, nor from one client nor from one person who was injured, nor from a real witness that can testify on their behalf. The **SEC** claims the Subordinated Loan Agreements were clearly securities, this is a call for a jury to decide. A U.S. Attorney helped me draft it; two U.S. Attorneys in the Secretary of States Office reviewed it and critiqued it, one being the Senior Staff Attorney of Securities Division of the State of Mississippi. No, I don't believe that any prudent person would say this was clearly a security, but if there was a change in the opinion, I should have been given a window of opportunity to rectify it. It comes down to this. Did The **Reeves v. Ernst & Ernst Young, 494 U.S. 56 (1990) (Op.4-5)** happen before Rayburn sought legal help or after he sought legal help. Rayburn is not an attorney. Rayburn didn't go to a divorce attorney; he went to the best Security Attorney in the state. He went to the elite. He paid for their expertise. You can't find a better place for information in your State when it comes to the law, than to an extension of, a branch of the Federal government who governs you. Rayburn exposed himself to them, manifested his intentions, and declared his incorporation and its function. He said, "I'm going to be doing business in this arena and I need to raise money, I want to make sure I'm legal

before I get too deep in to this. What must I do? Before I go any further, do I need to start over, do I need to change something, what are my obligations, do I need to register. Tell me, what must I do." **(Appendix E)** They in turn, say do this, and this and you will be ok, and for a fee we will give you an official opinion. In the fall of 1990 I received my official opinion from the State of Mississippi. If any body should know about this particular **(Reeves v. Ernst)** case, these attorneys should know. This would have not been research material. It is clear and evident in the record that the facts submitted to the court are misleading and clearly erroneous and intended to bias the magistrate in favor of the plaintiff and against the defendant, for this case information referenced was not in Rayburn's records. The judge had a bias mentality using only misstatements, omissions and hearsay. No material evidence was ever presented by the plaintiff that would support the allegations, but the judge could think of nothing but those "poor widows" that were erroneously displayed. He knew nothing factual about any of them. He wrote his opinion, never mentioning the SEC's negligence nor his own. He was not concerned about the material evidence presented by the defendant indicating that every dime of their money could have been recovered. He did not think about these poor widows enough to let the defendant operate his business and collect according to his first orders from his bench. If it was the judge's money and the defendant said, it could be collected, he being human would have jumped at the opportunity. No, the defendant wasn't negligent, when he tried over and over, even while on the creditors committee to perform his fiduciary duties. The **SEC** was the causation of the creditors not getting their money. That is where the negligence is and the Fraud, and who can stop them.

**Securities Regulation-Federal §1491 the requirement the fraud be pleaded with particularity is not met by general allegations of fraud, concealment, conspiracy, or aiding and abetting. It is also not sufficient to merely repeat the language of the federal securities laws or SEC rule 10b-5 in a complaint.**

The SEC alleges that Rayburn violated the **anti-fraud provisions 17(a) of the Securities Act of 1933, and Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934. Section 17(a) in part.** Makes it unlawful for any person in the offer or sale

of securities "to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary. In order to make the statements made, in the light to the circumstances under which they were made not misleading..." First of all, I never sold anything. Second, I was not dealing with Securities. Third, not one person has yet testified to any misrepresentations, or omissions supposedly made by Rayburn. The **SEC** does not have one witness to verify the truthfulness of the allegations. Not one word has been verified to what was said to induce so-called sales made by Rayburn. To find a violation of these anti-fraud provisions, the **SEC** must show that the misstatements (words) or omissions of fact were (1) material, and (2) made with the requisite level of scienter. **SEC v. Better Life Club of America, Inc. 995 F. Supp. 167, 175-76(D.D.C.1998) (citing Aaron v. SEC, 446 U.S.680, 691 (1980)**

To determine scienter there must be a jury trial.

Douglas Rayburn pro-sec

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

§947 Fifth Amendment's Due Process Clause applies, the government may not penalize an individual without first providing an opportunity for rebuttal, including cross-examination.

**Bennett v. National Transp. Safety Bd., 66 F.3d 1130 (10th Cir. 1996)**

§948 The due process right to be heard prior to any deprivation of property does not depend upon an advance showing that one will surely prevail at the hearing; the simplicity of the issues involved in determining the ultimate right to continued possession of the property may be relevant to the formality and scheduling of the prior hearing, but it cannot undercut the right to a prior hearing of some kind.

**Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. (CBC) 913(1972), reh'g denied, 409 U.S. 902, 93 S. Ct. 177, 34 L. Ed. 2d 165 (1972) and reh'g denied, 409 U.S. 902, 93 S. Ct. 180, 34 L. Ed. 2d 165 (1972).**

Douglas Rayburn pro-sec

## REASONS FOR GRANTING THE PETITION

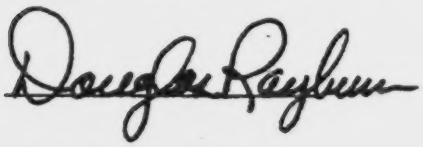
The reasons for coming before this honorable court are because of the prejudicial errors I have experienced with the courts previously. I have attempted to represent myself pro-se not because of my ability or self-esteem, but because of my financial condition. Yet I refuse to let the court discriminate against me, for my lack of legal knowledge and wrangling. I wanted to go to court. I wanted to be able to walk up to the bench and bring my witness and cross-examine my accusers. I have been denied my day in court. I have been denied my witness. I have been denied civil procedure. I presented material facts; (testimonies from witness, legal contracts) and many more could have been produced if proper venue would have been given, yet none of these things were ever addressed by the court, but all the SEC had to do is bring up an allegation and it became fact, never proved, never verified, only alleged. I was never allowed to cross-examine in any meaningful format. I was one of many spokes in a hub and lost my independence judicially and have been fighting this to the end, for my Constitutional Rights to a fair trial. Civil procedure should have been afforded me, representing myself, the same rights it affords the Federal Exchange Commission. This case will clearly show that prejudicial error has occurred which has obviously affected my substantial rights as an accused. By letting the SEC have sovereign rights to select the venue as it deals with Rayburn, they have had free course of language, with no objections, therefore tainting the mind of the magistrate and causing a biasness that is unquestionable, rendering an injustice to the individual rights safeguarded by the Constitution of the United States. This case started in Dec 1991 and the court made its ruling, May 18, 2000, nine years later. In nine years all the SEC ever came up with on Rayburn was his deposition, that according to Rule 30 (e) civil procedure they can't even use it for trial purpose, yet they did at the 5th district level (Plain Error Doctrine). The Whole Concept of Due process and speedy trial and Justice for ALL comes down to "who's willing to fight for it". I'm fighting, just give me a chance and look at my case.

Douglas Rayburn pro-sec

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 3-04-2002

# APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

Civil Action No. 91-3089 SSH

CURRENT FINANCIAL SERVICES, INC., et al.,

Defendants.

OPINION

Before the Courts is the Securities and Exchange Commission's ("SEC") motion for summary judgment and a permanent injunction against defendants Current Financial of Mississippi, Inc. ("CFSM") AND CFSM'S president Douglas R. Rayburn. [Plaintiff initiated this action against seventeen defendants, but reached settlement agreements with many of them. Plaintiff then filed this motion against seven of the remaining defendants, but has since resolved the claims against the other five defendants by consent judgments. Only one defendant, David Benner, remains in this action, and plaintiff is currently in settlement negotiations with him.] Upon consideration of the parties'

submissions and the entire record, the Court grants the SEC's motion. [In response to the SEC's summary judgment motion, Rayburn filed a "Motion for Discharge from Civil Action and the Release of Assets of Current Financial Services of Mississippi." Liberally construing that "motion," which was substantively a denial of liability, the Court treats it

As an opposition to plaintiff's motion for summary judgment. Rayburn and the SEC filed several response memoranda, and although Rayburn's submissions often were not filed within the deadlines prescribed under our Local Rules, the Court will consider them.] " Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56." Fed. R. Civ. P. 52(a); Summers v. Department of Justice, 140 f. 3d 1077, 1079-80 (D.C.Cir. 1998). Nonetheless, the Court sets forth its reasoning.

1. Background

Richard and Ray Hope founded Current Financial Services, Inc. ("Current") in 1988, to engage in the business of factoring medical receivables; they purchased receivables from various health care providers at a discounted price with the expec-

tation of collecting and retaining all or most of the full face value of the receivables. The primary risks were that a patient's health insurance did not fully cover the claim upon which a receivable was based and the possible insolvency of the insurer.

To raise capital and to finance its business operations, Current began entering into "investment agreements" with the general public; these " investment agreements" essentially were debt securities. Current offered a high rate of interest for these debt securities, ranging from 18% to 60% per year. Current used different forms of the debt security agreement, including the "Subordinated Debenture Agreement, " which subordinated the investor to other company debt, and the "Investment Agreement," which had no subordination clause.

To raise even more capital, the Hope brothers enlisted other individuals, such as Rayburn, who formed their own corporations and became "sub-issuers." The sub-issuers purchased debt securities from Current and financed the purchases by selling their own debt securities to the public. Selling debt securities was the sole or primary business of the sub-issuers. To pay interest to the sub-issuers and investors on the debt securities, Current relied on the success of its factoring operation. The sub-issuers obtained

funds to pay their investors from the spread in interest rates between what they received form Current and what they paid to their investors.

Current and the sub-issuers solicited investors widely, marketing the debt securities to the public as "investments." Rayburn initially solicited investors to invest directly in Current, and later used CFSM to solicit investors. His initial investors were widows from his church who withdrew money form certificates of deposit to invest in Current. He also placed an ad in a local newspaper to solicit investors for CFSM. By September 1991, CFSM had sold debt securities with an aggregate face value of approximately $500,000 to about 37 investors in five states.

When offering the debt securities to investors, Current and the sub-issuers made several misrepresentations and misleading omissions, including emphasizing a high rate of return without a reasonable factual basis for such an assertion, and omitting information regarding the risks involved. None of these instruments were registered with the SEC. Current and the sub-issuers, however, had notice that selling the investment agreements raised legal problems, as various attorneys told Current and some of the sub-issuers on different occasions that Current was offering and

selling "securities." Current's business records also contained a copy of an article discussing the Supreme Court's decision in Reves v. Ernst & Young, 494 U.E. 56 (1990) holding that promissory notes are presumed to be securities. Richard and Ray Hope, however, assured the sub-issuers that their activities were legitimate.

The SEC initiated this action against 17 defendants, alleging that the defendants (1) offered and sold unregistered securities in violation of Section 5 of the Securities Act of 1933, 15 U.S.C.§ 77e ("Section5"), and (2) made material misstatements and omissions of material facts when selling the securities to investors in violation of the anti-fraud provisions in Section 17(a) of the Securities Act of 1933, 15 U.S.C.§77q(a) ("Section 17(a)"), Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C.§ 78j(b) ("Section 10(b)"), and Rule 10b-5 promulgated there under, 17 C.F.R.§ 240/10b-5 ("Rule 10b-5"). The SEC now brings this summary judgment motion and seeks a permanent injunction against future violations as well as a judgment for disgorgement.

Summary judgment

Summary judgment may be granted only if the pleadings, depositions, answers to interrogatories, and admissions on

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56©. In considering a summary judgment motion, all evidence and the inferences to be drawn from it must be considered in a light most favorable to the nonmoving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 106 S. Ct. 1348, 1356 (1986). Summary judgment cannot be granted "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2510 (1986)

As a threshold matter, the Court must determine whether the "Subordinated Debenture Agreements" offered by CFSM and Rayburn are "securities." A security includes "note," "bond," "debenture," "certificate of interest or participation in any profit-sharing agreement," or "investment contract." 15 U.S.C. § 77b(a)(1). To decide whether a transaction is a security, the Supreme Court has determined that every note is presumed to be a security; a court must then determine whether any factors exist to rebut that presumption. Reves, 494 U.S. at 66-69. In Reves, the Supreme Court outlined the steps that a court should follow.

First, a court must assess the motivations of the buyer and seller in entering into the transaction. "If the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a security. Id. At 66. Second, a court must examine how the instrument was distributed to determine whether there is "common trading for speculation or investment"; offering and selling the instrument to a broad segment of the public satisfies this factor. Id. Third, a court should examine whether the investing public reasonably expected that the investments were securities. Id. Finally, a court should examine whether some factor such as the existence of another regulatory scheme significantly reduced the risk of the instruments. Id. At 67.

Based upon the evidence presented, the Court concludes that the instrument that CFSM and Rayburn sold is a security. CFSM and Rayburn offered the instruments tot the public to raise capital to finance its purchases of the instruments Current offered (which the Court also concludes are securities). The investors who bought them earned profits in the form of interest. CFSM and Rayburn sold these instruments to the public, even advertising

in a news paper; collectively, Current and the sub-issuers sold the instruments to over 570 investors in 15 states, with Current raising $10 million and the sub-issuers raising in excess of $8 million. The instruments were also held out to the public as investment agreements. Finally, the Court sees no factor that significantly reduces the risk of the instrument. The Court next determines whether summary judgment should be entered against each defendant.

CFSM

Rayburn is proceeding pro se. He filed an opposition to the SEC's summary judgment motion on behalf of himself and CFSM. The Court, however, informed him that corporations may not proceed pro se and directed CFSM to obtain counsel within 28 days, or the SEC's motion would be deemed conceded. Instead of obtaining counsel, Rayburn filed a motion requesting a release of frozen funds to obtaining counsel, which the Court denied. In that same Order, the Court advised CFSM that failure to obtain legal counsel and respond within 28 days would result in the SEC's motion being treated as conceded and judgment being entered in the SEC's favor. To date,

CFSM has not obtained counsel or properly filed and opposition; accordingly, the Court treats the motion as conceded. Without any evidence to the contrary, the Court finds that the SEC has demonstrated that summary judgment should be entered in its favor as to CFSM.

Raybu rn

Selling unregistered securities

The SEC contends that Rayburn violated Section 5 of the Securities Act of 1933. Section 5 prohibits the sale or delivery after sale of unregistered securities. 15 U.S.C. § 77e(a). In its supporting memorandum, the SEC documents Rayburn's offer and sale of unregistered securities to the investing public. Rather than disputing that he offered and sold unregistered securities, Rayburn argues that he did not know that what he was selling was considered a security, and that he was led to believe he was selling a legitimate instrument. He even consulted attorneys, one of whom requested an opinion letter from the Secretary of State of Mississippi. That opinion letter, from Michael Henry, a senior staff attorney in the Securities Division, concluded that, based on the circum-

stances presented before him, the agreement was not a security.

The Securities Act of 1933, however, imposes strict liability on offerors and sellers of unregistered securities. Swenson v. Engelstad, 626 F. 2d 421, 424 (5th Cir. 1980). Scienter is not required under Section 5 of the Securities Act. See SEC v. Parkersburg Wireless Ltd. Liability Co., 1997 Wl 823644, at *2(D.D.C.1997); SEC v. Friendly Power Company, LLC, 49 F. Supp.2d 1363, 1367 (S.D.Fla. 1999) . It therefore is irrelevant whether Rayburn knew that what he was selling was a security. Furthermore, Mr. Henry did caution that his conclusion "is premised upon the statements and representations as set forth in [Rayburn's] letters and attachments only and should not be relied upon for any other set of facts or circumstances"; it also indicated that the determination was based only on Mississippi state law, not federal securities law. See Ex. A, Def.'s Opp. 6/18/98. Mr. Henry later stated in a declaration signed on April 26, 1993, that he was provided with no information, or was misinformed, about many relevant circumstances, such as the economic reality

of the contemplated transactions. See Ex. B, Def.'s Opp. 6/18/98/ The Court therefore finds that no issue of material fact exists as to whether Rayburn sold unregistered securities. Thus, summary judgment is granted on this count.

Fraud violations

The SEC also alleges that Rayburn violated the anti-fraud provisions of Section 17(a) of the Securities Act of 1933, and Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934. Section 17(a) in part makes it unlawful for any person in the offer or sale of securities " to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading...." 15 U.S.C. § 77q(a)(2). Section 10(b) makes it unlawful "to use or employ, in connection with the purchase or sale of any security... any manipulative or deceptive device or contrivance in contravention [of SEC rules and regulations}." Rule 10b-5, promulgated pursuant to Section 10(b), in relevant part, makes it unlawful for any person "to make any untrue statement of a material fact or to omit to state a material

fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading...." 17 C.F.R. § 240.10b-5(b).

To find a violation of these anti-fraud provisions, the SEC must show that the misstatements or omissions of fact were (1) material, and (2) made with the requisite level of scienter. SEC v. Better Life Club of America. Inc., 995 F. Supp. 167, 175-76 (D.D.C.1998) (citing Aaron v. SEC, 446 U.S. 680,691 (1980)). However, as is true for Section 17(a), no scienter is required to show a violation of Sections 17(a)(2) and 17(a)(3). Aaron, 446 U.S. at 702.

The test to determine whether a misrepresentation was material is "whether a reasonable investor would consider the representations important." Id. At 177 (citing Basic v. Levinson, 485 U.S. 224, 231 (1988)). Rayburn, along with Current and other sub-issuers, emphasized a high rate of return, when in fact, Current's financial statements show a company that was insolvent or, at best, marginally insolvent. Furthermore, Rayburn did not conduct an in-depth review of Current's accounting or financial records to determine if Current was generating sufficient revenue to pay CFSM or its investors. As did Current and other sub-

issuers, Rayburn also falsely portrayed the debt securities as "very safe", in various publications, he and other sub-issuers represented that Current bought receivables only from healthcare and medical providers, that Current carefully selected receivables, and that the receivables were always backed by health insurance or Medicare/Medicaid. Current and the sub-issuers did not reveal, however, that Current also purchased uninsured receivables and some receivables not from medical providers. They also compared their high rates of returns to the low yield offered by bank certificates of deposit, but either minimized or did not reveal the difference in risk. Moreover, Rayburn falsely represented to CFSM's investors that CFSM itself purchased receivables form May 1990, when in fact, CFSM purchased only debt securities from Current at that time. Rayburn also used a "Subordinated Debenture Agreement," but did not explain to his investors that this meant that their debt would be subordinate to the other company debt.

While the misrepresentations or omissions of fact may have been material, the Court must also consider whether Rayburn acted with the requisite degree of scienter. No scienter is required for a violation of § 17(a)(2) or § 17(a)(3), and thus,

Rayburn has violated those provisions. To show a violation of the other provisions, however, the Supreme Court has held that the SEC must prove scienter; that is, that the defendant acted with "and intent to deceive, manipulate, or defraud." Aaron, 446 U.S. at 686. Demonstrating recklessness may satisfy the intent requirement. Better Life Club of America, 995 F. Supp. At 175. A person acts with the requisite scienter when the conduct "presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the defendant must have been aware of it," SEC v. Steadman, 967 F.2d 636, 641-2(D.C. Cir. 1992) (citations omitted).

Rayburn argues that he lacked scienter in making certain representations to investors, claiming that he simply relied on information given by Richard and Ray Hope, and thought he was running a legitimate business. The Court, however, finds that there is no genuine issue as to whether Rayburn made a misstatements or omitted material facts. First of all, Rayburn's representation that CFSM was purchasing receivables at a time when CFSM was purchasing only debt securities from Current, as well as his failure to tell investors that the nature of a "subordinated debenture agreement," demonstrate at least reckless, if no knowing,

conduct. Even if Rayburn relied on Richard and Ray Hope's representations, his failure to investigate or verify those representations would indicate at least reckless behavior. "Securities dealers cannot recommend securities without a reasonable basis for the recommendation; if essential information is not known to a securities dealer, the dealer must inform investors that this information is unknown and must disclose the risks of such uncertainty." SEC v. Kenton Capital. Ltd., 69 F. Supp. 2d 1, 9 (D.D.C.1998). See Hanly v. SEC, 415 f.2d 589, 595-6(2dCir.1969) ("Brokers and salesmen are under a duty to investigate, and their violation of that duty brings them within the term 'willful" in the Exchange Act."). Thus, "a salesman cannot deliberately ignore that which he has a duty to know and recklessly state facts about matters of which he is ignorant." Kenton Capital, 69 F. Supp 2d at 9. Rayburn blindly accepted the information given to him, and thus recklessly made misrepresentations or omissions of material facts to his investors. The Court therefore finds that he violated the antifraud provisions.

Permanent injunction

Finding that Rayburn and CFSM are liable under federal securities law, the Court now considers whether to order a permanent

injunction. Permanent injunctive relief is appropriate if a reasonable likelihood exists that a defendant will violate the securities laws in the future. SEC v. Bilzerian, 29 F. 3d689, 695(D.C.Cir.1994); Better Life Club of America, 995.Supp. at 178. The Court Should consider the risk of future violations based on the totality of the circumstances, where the relevant factors are "whether a defendant's violation was flagrant and deliberate or merely technical in nature, and whether the defendant's business will present opportunities to violate the law in the future." Steadman. 967 F.2d at 648.

Rayburn acted as a sub-issuer for more than one year, raising approximately $500,000, and guided other sub-issuers in selling debt securities to investors; his violations were not isolated but part of a pattern. His violations also were not merely technical in nature; he recklessly violated the registrations and anti-fraud laws without properly investigating whether his conduct was legal. The Court therefore finds that entry of summary judgment in favor of plaintiff SEC and a permanent injunction against CFSM and Rayburn. Accordingly:

1. It hereby is ORDERED, that the SEC's motion for summary judgment and permanent injunction is granted as to

defendants Current Financial Services of Mississippi, Inc. (CFSM) and Douglas R. Rayburn.

2. It hereby further is ORDERED, that CFSM and Douglas R. Rayburn their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this Opinion and Judgment by personal service or otherwise, and each of them, be and hereby are permanently enjoined and restrained from violating Sections 5(a) and (c) of the Securities Act of 1933, 15 U.S.C. §§ 77e(a) &(c). by, directly or indirectly, in the absence of any applicable exemption:

(A) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell the securities of any issuer, through the use or medium of any prospectus or otherwise, unless and until a registration statement is in effect as to such securities;

(B) carrying or causing to be carried through the mails or in interstate commerce, by means or instruments of transportation, for the purpose of sale or for delivery after sale, the securities of any issuer, unless and until a registration statement is in effect as to such securities; or

(C) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to by through the use or medium of a prospectus or otherwise the securities of any issuer, unless and until a registration statement has been filed with the Commission as to such securities, or while a registration statement as to such securities is the subject of a refusal order or stop order or (prior to the effective date of the registration statement any public proceeding or examination under Section 8 of the Securities Act of 1933, 15 U.S.C. §77h/

(3.) It hereby further is ORDERED, that CFSM and Douglas R. Rayburn, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this Opinion and Judgment by personal service or otherwise, and each of them, be and hereby are permanently enjoined and restrained from violating Section 17(a) of the Securities Act, 15U.S.C. § 77 q(a), directly, by the use of any means or instruments of transportation or communication in interstate commerce, or by the use of the mails:

(A) to employ any device, scheme, or artifice to defraud;

(B) to obtain money or property by means of any untrue statements of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser,

in the offer or sale of any securities.

(4). It hereby further is ORDERED, that CFSM and Douglas R. Rayburn, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this Opinion and Judgment by personal service or other wise, and each of them, be and hereby are permanently enjoined and restrained from violating Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C>F>R> § 240. 10b-5, promulgated there under, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange:

(A) to employ any device, scheme, or artifice to defraud;

(B) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(C) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

(5.) It hereby further is ORDERED, that until further order of this Court, paragraph IV of the Preliminary Injunction and Order for the Freezing of Assets and Other Relief entered against CFSM and Douglas R. Rayburn on February 13, 1992, shall remain in effect.

(6.) It hereby further is ORDERED, that CFSM and Douglas R. Rayburn, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this Opinion and Judgment by personal service or otherwise, and each of them, unless otherwise ordered by the Court for cause shown, are enjoined for a period of five (5) years from the date of entry of this Opinion and Judgment form destroying, mutilating, concealing, altering, or disposing of

any items, including but not limited to any books, records, documents, contracts, agreements, assignments, obligations, audio and video tape recordings, computer media or other property, relating to the activities described in the Complaint, to Current Financial Services, Inc., or any of its affiliates or subsidiaries, or to the other defendants to this action, or to any of the securities, financial, or business dealing of any of the foregoing.

(7.) It hereby is ORDERED, that this Court shall retain jurisdiction over this action for all purposes, including the ordering of disgorgement and civil penalties pursuant to a motion to be filed by the SEC, and the enforcement of this Judgment.

SO ORDERED.

Stanley S. Harris

United States District Judge

Date: May 18, 2000

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 00-5452
SEPTEMBER TERM, 2001

91CV03089

SECURITIES AND EXCHANGE COMMISSION

Appellee

v.

Filed on:
OCT 15 2002

Douglas R. Rayburn,

MAN-

DATE: DEC 12 5 2001
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BEFORE: Rogers and Tatel, Circuit Judges; and
Williams, Senior Circuit Judge

JUDGMENT

This appeal was considered on the record from the united states district court for the district of Columbia and on the briefs filed by the parities. The court has determined that the issues presented occasion no need for an opinion. See Fed. R. App. P. 36; D. C.

Cir. Rule 36(b). It is

ORDERED AND ADJUDGED that the district court's judgment be affirmed, substantially for the reasons stated in its opinion filed may 18, 2000. to the extent appellant challenges the district court's denial of his motion for a change of venue, appellant has not shown that the district court abused its discretion in denying the motion. See 28 U.S.C. § 1404(a); Sec v. Savoy Indus., Inc., 587 F.2d 1149, 1154(D.C.Cir. 1978). To the extent Rayburn makes arguments on appeal that he did not make below, this court declines to consider those arguments. See District of Columbia v. Air Florida. Inc. 750 F.2d 1077, 1084 (D.C.Cir. 1984).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41 (b), D.C. Cir. Rule 41.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 00-5452
SEPTEMBER TERM, 2001

91CV03089

SECURITIES AND EXCHANGE COMMISSION

Appellee

v. Filed on: Jan 10 2002

Douglas R. Rayburn,
Appellant

BEFORE: Rogers and Tatel, Circuit Judges; and
Williams, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing filed December 14, 2001, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT

Mark J. Langer, Clerk

Michael C. McGrail

Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

V.

Civil Action No.91-3089 SSH

CURRENT FINANCIAL SERVICES, INC, et al.

Filed May 18, 2000

Defendants.

JUDGMENT

For the reasons stated in the accompanying Opinion, it hereby ORDERED, that judgment is entered in favor of the Securities and Exchange Commission as to defendants Current Financial Services of Mississippi, Inc., and Douglas R. Rayburn.

Stanley S. Harris

United States District Judge

Date May 18 2000

Whittington & Burkhalter
Attorneys at law
229 Main Street
Drawer 1919
McComb, Mississippi 39648

Ronald l. Whittington
Donald r Burkhalter

Ms. Tammy Harthcock
Securities Division
Post Office Box 136
Jackson, Mississippi 39205

October 3, 1990

Dear Ms. Harthcock:

Please find with this letter a copy of the investment agreement which we discussed earlier this morning. My client is interested in whether or not he has any obligations under Mississippi securities laws to either register with the Secretary of State or obtain prior approval before using this contract. Any other information that you can provide me regarding this type investment business will be very helpful.

Thank you for your assistance in this matter. If you have nay questions which you think I may be able to answer please telephone me at your convenience. I look forward to your response.

Sincerely,

Donald R. Burkhalter

APPENDIX E-1

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBI

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
V.
CURRENT FINANCIAL SERVICES OF
MISSISSIPPI, INC.
DOUGLAS RAYBURN
Defendants

ANSWER TO APPLICATION
FOR A TEMPORARY RESTRAINING ORDER
AND ORDER FOR THE FREEZING OF ASSETS
AND OTHER RELIEF

COMES NOW, Douglas R. Rayburn and Current Financial Services of Mississippi, Inc., pro se and answers the application for a temporary restraining order and order for the freezing of assets and other relief filed against them as follows, to -wit:

FIRST DEFENSE

That the application fails to state a claim from which relief can be granted.

SECOND DEFENSE

That the defendants have not been served with process but have been served with the documents and were served on Friday, November 29, 1991.

## THIRD DEFENSE

That this is a special appearance and the defendants do not waive any rights they have to assert lack of jurisdiction and improper venue.

And now, for further answer, the defendants allege that the application for temporary restraining order and order for the freezing of assets and other relief should be denied.

To freeze assets would detrimentally affect the business of the defendants, who are conducting legitimate business practices in the State of Mississippi, by not allowing it to pay employees and conduct regular business operations.

The defendants are willing to produce copies of any and all documents requested by the Securities and Exchange Commission for review in an expeditious manner.

Respectfully Submitted,

_____

Jere Rayburn, Pro Se
Current Financial Services Of Mississippi, Inc.
305 Rawls St.
Mc Comb Ms. 39648

Dated: December 3, 1991

APPENDIX F-2

2. In paragraph six on page four there is a typographical error where "finds" should be "findings."

3. I am not sure I understand the meaning of paragraph 15. It seems to me that if the Commission obtains a recovery from the Hopes, Pete Goff, or Alpha, there is no reason to make the money available for distribution through Current's plan of reorganization. If the Commission did turn the money over to Current to be distributed, I also thick there would be a problem with earmarking it solely for the investors and not paying a pro rata share to the unsecured creditors with allowed claims. As a practical matter, giving the unsecured creditors a pro rata share in such an award would not make much difference because their claims are relatively small, but I think the money recovered by the Commission would not be property of the estate under 541 of the Bankruptcy Code and there is no reason to return it to Current.

4. I would prefer deleting the provision in paragraph 16 that

Current agrees to provide the Commission with a copy of the plan 10 days before filing. I certainly have no problem with doing so, but I would prefer this not to be in the consent and undertaking simply to avoid the appearance that Current is only the Commission's Cat's Paw. However, if this is necessary for Judge Harris to approve the consent and judgment, we certainly can live with it.

5. As I understand the draft, the sub-issuers who are to be cut out are those who are defendants in the SEC suit. One of the sub-issuers, Southeast Equities, in not a defendant. As a practical matter, I do no believe this makes much difference because there are only two investors in Southeast Equities, each with a $50,000 investment.

III. HEATHER VESTERFELT

Paragraph 14 would require Current to object to Heather Vesterfelt's claims. In conversations with John, Heather has represented that her Husband, Ken, can assist our efforts in recovering from Home Intensive Care by identifying the Class II and class III receivables. The assistance of the Vesterfelts could be worth more than $500,000 to Current and to its investors. Heather Vesterfelt has filed two proofs of claim aggregating

approximately $188,000. Presently Current has enough money to pay the investors and other approved claims approximately .10 on the dollar, and therefore giving heather approximately $18,000 for her possible assistance in recovering a great deal more for the estate should be given consideration. If we draft paragraph 14 to give John some leeway here, it might prove

8/28/97

Mr. Doug Rayburn
329 Lawrence Reid Rd.
Jayess, Ms. 39641

Dear Doug,

It was a pleasure speaking with you. As we discussed, I would be happy to assist you in any way I am able, to pursue collection of the Home Intensive Care medical receivables. I collected in excess of two million dollars on those receivables on behalf of Current Financial Services, prior to the company going into receivership. To the best of my recollection I estimated that there was another three to five million dollars, if not more, in collectible receivables that were still outstanding at that time.

I clearly recall that the receiver had no experience in collecting medical receivables. Further the receiver had documented that they were aware of my experience and knowledge and had considered contacting me. I was never contacted and as you know time is the enemy base on certain statues of limitation.

Keep me informed; Doug, and I will do whatever I can to help.

My regard to your family.

Sincerely,

Kenneth R. Vesterfelt

APPENDIX H-1